No. 83-1864

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

RICHARD THORNBURGH, Governor,
HELEN O'BANNON, Secretary of
the Department of Public Welfare,
and DON JOSE STOVALL, Executive
Director, Philadelphia County
Board of Assistance

Petitioners

v.

MARTIN NELSON, PAULA BUNTELE,
and THOMAS MOBLEY

Respondents

AMICI CURIAE BRIEF In Support Of The Grant Of A Writ Of Certiorari On Behalf Of Arizona, Delaware, Georgia, Hawaii, Illnois, Louisiana, Mississippi, New Hampshire, North Dakota, South Dakota, the Virgin Islands, and Wyoming

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OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit has not yet been reported. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 567 F. Supp. 369 (E.D. Pa. 1983). The judgment order of the Court of Appeals and the opinion of the district court are reproduced in the appendix to the petition for writ of certiorari of Governor Richard Thornburgh, et al.

CONSENT OF THE PARTIES

Consent of the parties is not required since this brief is presented on behalf of the States, Commonwealths or Territories of Arizona, Delaware, Georgia, Hawaii, Illinois, Louisiana, Mississippi, New Hampshire, North Dakota, South Dakota, the Virgin Islands, and Wyoming, by their respective Attorneys General (hereinafter Amici). See U.S.S.Ct. Rule 36.4.

INTEREST OF AMICI CURIAE

In Nelson, the Third Circuit pronounced expansive entitlements under Section 504 of the Rehabilitation Act of 1973 for handicapped persons employed by recipients of federal funds. The interest of Amici, all of whom are recipients of federal funds, stems from their role as employers of handicapped persons, and the significant impact of this decision on their responsibilities as employers.

The Court of Appeals held, in affirming the district court by judgment order, that Section 504 requires Pennsylvania's Department of Public Welfare to provide readers for blind employees, at a cost of $6,600 per year for each blind

worker.[1] In more general terms, the Court held that Section 504 requires a recipient of federal funds to expend substantial sums to enable handicapped employees to perform their job duties. If the Third Circuit's decision stands, the states will be uncertain as to the nature and extent of the obligations which they assume under Section 504 when they choose to accept federal funds. The states have a strong interest in obtaining the clearest and earliest possible guidance on the Section 504 issues, in order to plan effectively for

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[1] Nelson is a class action. Plaintiffs' counsel estimated at trial that the class consists of approximately 78 employees. Pet. App. 82a-83a. Whatever the precise number, and whatever the level of accommodation required for each member, it is clear that Pennsylvania's Department of Public Welfare will have to spend substantial sums each year to accommodate its blind employees.

required accommodations for the handicapped. Indeed, this guidance is needed to enable states to decide whether to accept the federal funds which trigger Section 504 obligations in the first place.

Moreover, should the decision of the Third Circuit stand, additional lawsuits are inevitable. Considering that the states employ thousands of handicapped persons, the potential for future federal court litigation of similar issues is staggering.

Finally, the Court of Appeals decided that the Eleventh Amendment does not bar a federal court from ordering state officials to expend state funds when the basis for the order is a federal statute enacted pursuant to Congress' spending power. This question was left open by this Court in Pennhurst

State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984). States have a substantial interest in obtaining this Court's decision on this question. Amici are entitled to know whether, when they accept federal funds, they are exposed to the risk of having to expend substantial sums to comply with federal court injunctive orders based on spending power statutes.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in the petition for writ of certiorari of Governor Richard Thornburgh, et al.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Raises Significant Questions As To The Scope Of Obligations Placed Upon Recipients Of Federal Funds By Section 504 Of The Rehabilitation Act Of 1973.

In Southeastern Community College v. Davis, 442 U.S. 397 (1979), this Court decided that Section 504 did not require an educational institution to undertake substantial modifications to its program to enable plaintiff Davis, who had a hearing disability, to participate in the program. Here, the Third Circuit, contravening the principles set forth in Davis, has ordered Pennsylvania to take substantial, costly steps to enable blind employees to perform their jobs. The Third Circuit's holding likewise conflicts with decisions of the First, Second, and District of Columbia Circuits. The latter courts have held

that Section 504 does not require entities which receive federal monies to undertake substantial, expensive affirmative steps to accommodate handicapped persons. See Rhode Island Handicapped Action Committee v. Public Transit Authority, 718 F.2d 490 (1st Cir. 1983); Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (transportation authorities not required by Section 504 to undertake expensive affirmative action to make public transportation accessible to the handicapped).

Serious questions as to the scope of obligations placed upon recipients of federal funds by Section 504 have thus been raised by the decision in Nelson. Nelson appears to hold that whenever a recipient of federal monies has a "large"

budget -- regardless of the magnitude of the existing obligations which that budget must fund -- Section 504 requires the recipient to spend substantial amounts to enable handicapped persons to overcome their disabilities.

Plainly, the uncertainty created by the Nelson decision causes significant difficulties for all Amici in planning and providing accommodations for the handicapped. At present, states spend substantial amounts on accommodations for the handicapped each year. For state policymakers and administrators to effectively make short and long range plans, it is imperative that they know whether the Section 504 entitlements declared in Nelson are valid and will, therefore, become applicable elsewhere in the country. Absent such guidance, Amici are severely hampered in planning

rational allocations of their limited resources.

Amici are entitled to know the conditions imposed upon them by Congress when they decide to accept federal funds. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). In the context of this case, Amici must know whether they assume the expensive Section 504 obligations delineated by the Third Circuit when they accept federal grants. Without this knowledge, Amici cannot make rational determinations as to whether to accept federal funds in the first place.

II. This Court Should Resolve The Question Whether The Eleventh Amendment Bars A Federal Court From Ordering State Officials To Expend State Monies When The Order Is Based On A Federal Spending Power Statute.

In Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984), this Court specifically declined to decide whether the Eleventh Amendment bars a federal court from ordering state officials to expend state funds when the basis for the order is a federal statute enacted under Congress' spending power. Slip Op. at 13, n.13. This issue is of considerable significance to Amici because of its implications for states' sovereignty, and its potential impact on state budgets.

In general terms, a suit is brought against the state if the relief sought would be paid for from state

funds or interfere with public administration, or if the effect of the judgment would be to restrain or require governmental action. See Pennhurst, supra, slip op. at 10-11, n. 11. An action wherein a plaintiff seeks costly injunctive relief against state officials pursuant to a federal spending power statute is a "suit against the state" by any measure. If a state has not waived its immunity from suit, either generally[2] or by accepting federal funds,[3] and if the state defendants were not acting ultra vires, the Eleventh Amendment bars such suits. Florida Department of State v. Treasure

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[2]See Pennhurst, supra, slip op. at 12-13, n. 12.

[3]See Edelman v. Jordan, 415 U.S. 651, 673-674 (1974).

Salvors, Inc., 458 U.S. 670 (1983); Ex Parte Young, 209 U.S. 123 (1908).

Assuming the absence of any waiver of immunity, then,[4] the sole Eleventh Amendment inquiry becomes whether state defendants have acted ultra vires. This is a two-pronged question: (1) Were the state defendants acting within the authority apparently delegated to them by the state? (2) If they were, did federal law strip them of that authority? Pennhurst, supra, slip op. at 9-12. Amici believe, in agreement with the position taken by the Commonwealth of Pennsylvania, that where state officials act within the

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[4]Pennsylvania did not in any way waive its immunity from suit in this case. See Petition for Writ of Certiorari of Governor Richard Thornburgh, et al., at 18-19.

authority apparently delegated to them by the state, federal spending power statutes cannot operate to strip them of that authority. Spending power statutes, rather than prohibiting or requiring conduct by state officials, merely induce conduct. They reward conduct meeting their conditions by providing states with federal funds, and sanction undesired conduct by withholding funds. Spending power statutes in no way implicate the fiction of Ex Parte Young, supra. Accordingly, federal court actions against state officials based upon federal spending power statutes are actions against the state in every respect, and are barred by the Eleventh Amendment.

As noted above, states, when they accept federal funds, are entitled to know the conditions imposed upon them

via federal spending power statutes. At present, Amici do not know whether their acceptance of federal grants exposes them to the risk that a federal court, acting pursuant to a federal spending power statute, may grant injunctive relief requiring them to expend substantial sums from the state treasury. As long as this is the case, Amici cannot make rational choices as to whether or not to accept federal funds. In some instances, the risk of significant depletion of the state treasury to pay for injunctive relief may outweigh the benefits of federal funding.

Amici are entitled, then, to know whether they are in fact incurring substantial risks of this sort by accepting federal grants. All states would directly benefit by a definitive

statement from this Court as to whether the Eleventh Amendment bars federal courts from ordering costly injunctive relief, based on federal spending power statutes, which will be paid for out of limited state funds.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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